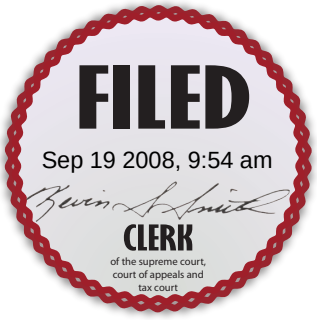


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# IN THE
# COURT OF APPEALS OF INDIANA

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|---|---|---|
| LAURENCE F. MYERS, JR., | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 79A02-0802-CR-169 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Les A. Meade, Judge
Cause No. 79D05-0707-FD-372

**September 19, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MAY, Judge**

Laurence F. Myers, Jr., appeals his convictions of Class A misdemeanor battery[1] and Class D felony intimidation.[2] He also asserts his five-year sentence is inappropriate in light of his character and offense. The victim's testimony was not incredibly dubious and his sentence is appropriate in light of his criminal history, which includes five felony convictions, eleven misdemeanor convictions, and five probation revocations. Accordingly, we affirm.

## FACTS AND PROCEDURAL HISTORY

In April of 2007, Myers began living with his girlfriend, Norma Talamantes. On May 9, 2007, Myers went to work. Talamantes expected him to return between six and seven in the evening, but he did not arrive home until after 9:00 p.m. When Talamantes asked Myers why he had not responded to her calls or text message, Myers became angry and began punching Talamantes on her face, shoulders, back, and legs. He carried her to the bedroom, threw her on the bed, and continued hitting her. At one point Myers wrapped a phone charger cord around Talamantes' neck, but Talamantes was able to get her hands underneath the cord before he could tighten it around her neck. When Talamantes began screaming, Myers put a blanket over her face to muffle the screams and told her if the neighbors called the police, he would kill her. He also told her he would kill her if she contacted the police. Then he left the apartment and did not return for four days.

Three days after the batter, on May 12, 2007, Talamantes told a friend what had happened. The friend took Talamantes to the police station to report the incident.

[1] Ind. Code § 35-42-2-1.
[2] Ind. Code § 35-45-2-1.

Officer Grant Snyder took Talamantes' report, talked to her about "her options as a domestic battery victim," (Tr. at 48), and suggested she obtain a protective order through the YWCA. He had a female officer, Natalie Lovett, take pictures of Talamantes' injuries. The pictures show bruises on Talamantes' right shoulder blade and the outer portion of her right upper arm, a large and a small bruise on her left upper thigh, a large bruise on her right buttock, a smaller bruise at the top center of her buttocks, and a bruise on the inner part of her left upper forearm that is shaped like a thumb.

The State charged Myers with battery, intimidation, and Class D felony strangulation.[3] It also alleged Myers was an habitual offender.[4] A jury found Myers guilty of battery and intimidation, but not guilty of strangulation. At a separate hearing, the court found Myers was an habitual offender. The court sentenced Myers to one year for battery and two years for intimidation, with those sentences to be served concurrently. It enhanced his intimidation sentence by three years for his being an habitual offender.[5] Thus Myers' cumulative sentence was five years.

## DISCUSSION AND DECISION

1. Sufficiency of the Evidence

Myers asserts the evidence does not support his convictions. We must affirm his convictions unless no reasonable fact-finder could have found the evidence proved his guilt beyond a reasonable doubt. *Winn v. State*, 748 N.E.2d 352, 357 (Ind. 2001). When

[3] Ind. Code § 35-42-2-9.
[4] Ind. Code § 35-50-2-8.
[5] The State asserts: "The record is not clear as to which count the habitual offender enhancement was attached. However, to reach the aggregate of five years it would have to be attached to the intimidation conviction." (Appellee's Br. at 2, n.5.) We note the record required no clarification because a habitual offender enhancement can be attached only to a felony sentence, *see* Ind. Code § 35-50-2-8(a) ("the state may seek to have a person sentenced as a habitual offender *for any felony*") (emphasis added), and Myers was convicted of only one felony.

making our determination, we must view the evidence and the inferences therefrom in the light most favorable to the verdict, and we may neither reweigh the evidence nor reassess the credibility of the witnesses. *Id.*

Myers specifically argues Talamantes' testimony was coerced and "contrary to human experience." (Appellant's Br. at 11.) Under the "incredible dubiosity" rule, an appellate court may, within narrow limits, impinge on the fact-finder's role as judge of the credibility of witnesses:

> If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

*Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002) (internal citations omitted).

Myers' allegation that Talamantes' testimony was "coerced" is based on the fact the trial court told Talamantes, on the record, that she would be subject to jail time for contempt of court if she refused to testify when she had been subpoenaed.[6] We decline

[6] On the morning of Myers' trial, Talamantes told the court: "I just don't want to testify against him." (Tr. at 20.) The court's full response was:

> You don't want to testify against him. Do you understand you really don't have a choice uhm, you've been subpoenaed and you are here and you're going to be sworn to tell the truth and that is what you are expected to do? It is – it is not something that a witness can decide simply not to – not to testify. You could be placing yourself in jeopardy by refusing to testify. If you were to lie under oath, that could be the commission of the crime of perjury. If you were too [sic] simply refuse to testify that could be held to be contempt of court and then you could be jailed potentially. These are. . . no one is trying to threaten you, I just don't want there to be any surprises and I want you to understand what is – what is expected of you or of any other witnesses that is [sic] called before a court. Do you understand? All right, now uhm, I don't know exactly you know until this plays out I don't know exactly what is going to happen, but I don't want there to be any misunderstandings. No one wants you to lie or make things up. On the other hands [sic] a witness who is subpoenaed is expected to be here and a witness that is sworn to tell the

to hold informing a subpoenaed witness of possible negative consequences resulting from refusal to testify is "coercion" as contemplated in this rule – otherwise the testimony of every subpoenaed witness would be subject to exclusion under the incredible dubiousity rule.[7]

Nor was Talamantes' testimony "contrary to human experience." (Appellant's Br. at 11.) Myers claims: "No reasonable person could believe that a person who had been beaten would choose to do nothing for three days, then report the crime but call the police a day later to ask that charges not be pursued." (*Id.*) We do not believe Talamantes' behavior is as extraordinary as Myers wishes us to believe. Myers threatened to kill Talamantes if she went to the police; thus, we are not surprised Talamantes did not file a police report until a friend took her to the police station.[8] On the other hand, Talamantes married Myers two months after he battered her and she testified that she loved him; thus, we are not surprised that once she again had contact with Myers, which happened to be the day after the police report, she regretted filing the report and did not want the State to proceed with the charges.

Finally, Talamantes' testimony was not "wholly uncorroborated." *Love*, 761 N.E.2d at 810. The photographs taken at the police station three days after the incident corroborate her claim that she was punched on the shoulders, back, and legs. We decline

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> truth is expected to tell the truth, and that's – that's where we are today. Do you want to take another couple of minutes?

(*Id.*)

[7] Moreover, Myers invites us to infer Talamantes testified only because she did not want to go to jail. Application of his logic should also lead to an inference that she testified *honestly* because she did not want to be subject to the penalties of perjury. *See* supra n.6 (court informed Talamantes that failure to testify truthfully could lead to a charge of perjury). Accordingly, to the extent Talamantes was coerced, she was coerced to testify truthfully, which would not lead us to doubt her credibility.

[8] We also note Talamantes did not tell her friend until the day they went to the station, three days after the battery, and that Myers had not been home or contacted Talamantes in those three days.

Myers' invitation to find Talamantes' testimony incredibly dubious. The evidence was sufficient to support his convictions.

2. Sentence

Myers argues his "five year executed sentence is inappropriate" in light of his "character, addictions, and the wishes of the victim in this case." (Appellant's Br. at 17). We cannot agree.

> Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review of a sentence imposed by the trial court." This appellate authority is implemented through Appellate Rule 7(B), which provides that the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

*Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) (internal citations omitted), *clarified on reh'g on other grounds* 875 N.E.2d 218 (Ind. 2007). We give deference to the trial court's decision, recognizing its special expertise in making sentencing decisions. *Barber v. State*, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 208 (Ind. 2007). The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

The court sentenced Myers to two years for Class D felony intimidation, enhanced by three years for being an habitual offender, and to be served concurrent with one year for Class A misdemeanor battery. The sentencing range for a Class D felony is six months to three years, with an advisory sentence of eighteen months. Ind. Code § 35-50-2-7. Myers' two-year sentence for intimidation is greater than the advisory, but one year less than the maximum. An habitual offender enhancement is "an additional fixed term

that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense." Ind. Code § 35-50-2-8. The court enhanced Myers' sentence by twice the advisory, which is in the middle of the permissible range of enhancement. As for battery, Myers received the maximum sentence of one year, *see* Ind. Code § 35-50-3-2, to be served concurrent with the sentence for intimidation. Altogether, then, Myers received roughly two-thirds of the maximum sentence.

As for Myers' character, his criminal history includes eleven prior misdemeanor convictions: trespass and obstruction without violence in 1996, reckless driving in 1999, public intoxication in 2000, shoplifting and operating while intoxicated in 2001, battery in 2002 and 2003, criminal recklessness in 2005, and possession of marijuana and auto theft in 2006. He also has five prior felony convictions: resisting law enforcement in 2002, two counts of theft in 2003, operating a vehicle while intoxicated endangering a person in 2005, and possession of cocaine in 2006. At the time of the pre-sentence investigation report, he had four cases pending in Indiana and one in Colorado. His prior probations have been revoked five times. Those facts do not suggest a five-year sentence is inappropriate.

Neither does Myers' addiction to alcohol and drugs suggest his sentence is inappropriate. He admits he has received treatment a number of times for his drug and alcohol abuse, but he has not been willing or able to refrain from returning to substance abuse. Myers failure to take advantage of prior opportunities for rehabilitation does not make this sentence inappropriate.

Finally, the testimony of Myers' victim, Talamantes, regarding her desire that Myers receive a short or suspended sentence so that they might work on their marriage does not convince us his sentence is inappropriate. Myers punched Talamantes with his fists leaving bruises on her arms, back, and legs, and then he threatened to kill her if she or the neighbors reported the incident to the police. Her testimony at the sentencing hearing indicates he has charges pending for subsequently battering her and he stole her property to pawn for cash to buy drugs. While Talamantes' love may make her blind to Myers' character, we are not.

## CONCLUSION

Talamantes' testimony is not incredibly dubious and supports Myers' convictions. A five-year sentence is not inappropriate in light of Myers' character and crimes. Accordingly, we affirm.

Affirmed.

ROBB, J., and NAJAM, J., concur.